

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 8, 2014**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP706-CR**

**Cir. Ct. No. 2009CF2777**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ANDREW M. GREENWOOD,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KEVIN E. MARTENS and JEFFREY A. WAGNER, Judges.<sup>1</sup> *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

---

<sup>1</sup> The Honorable Kevin E. Martens entered the judgment of conviction. The Honorable Jeffrey A. Wagner entered the order denying postconviction relief.

¶1 PER CURIAM. Andrew M. Greenwood appeals a judgment convicting him after a jury trial of felony murder and possession of a firearm by a felon, both as a party to a crime. He also appeals an order denying his motion for postconviction relief. Greenwood argues that: (1) he is entitled to a new trial because one of the witnesses against him recanted; (2) he received constitutionally ineffective assistance from his trial lawyer; and (3) he is entitled to a new trial in the interest of justice. We affirm.

¶2 Jimmy Dean was robbed and murdered on December 19, 2006. Greenwood, Cortez Brooks and Corteaz Delaney were all charged with crimes stemming from Dean's murder. After a jury trial, Greenwood was convicted of felony murder and felon in possession of a firearm. Brooks, who shot Dean in the back of the head during the robbery, was convicted after a jury trial of first-degree reckless homicide, armed robbery with use of force and felon in possession of a firearm. After pleading guilty, Delaney was convicted of armed robbery with use of force.

¶3 Greenwood first argues that he is entitled to a new trial because Delaney recanted his trial testimony implicating him. Delaney testified during the trial that he, Greenwood, and Brooks went to Dean's house, ostensibly to trade guns with him, but really intending to rob him. Delaney testified that in the alley behind Dean's apartment, Brooks ordered Dean to strip at gunpoint, and then told him to lie down on the ground. Delaney testified that they robbed Dean and then he and Greenwood started walking away. Delaney said that he then heard a shot behind him, so he ran to Greenwood's house, which was nearby, without looking behind him to see what had happened. Delaney testified that when Brooks arrived at the house a few minutes later, he said, "I killed [the] dude."

¶4 On cross-examination, Delaney acknowledged that his story to the police was different than his trial testimony. He told the police that he was present when Dean was shot and that he saw Brooks shoot Dean in the back of the head while Dean was on the ground. Delaney agreed that his recollection when he talked to the police would have been better than it was at trial because he talked to the police closer to the time of the murder. Delaney also acknowledged at trial that he had entered into an agreement with the State to testify against Greenwood and Brooks in exchange for concessions from the State with regard to its sentencing argument in his case.

¶5 A defendant seeking a new trial on the basis of newly discovered evidence must prove that: ““(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.”” *State v. Plude*, 2008 WI 58, ¶32, 310 Wis. 2d 28, 48, 750 N.W.2d 42, 52 (citation omitted). When the newly discovered evidence is the recantation of a witness, the recantation must be corroborated by other newly discovered evidence. *State v. McCallum*, 208 Wis. 2d 463, 476, 561 N.W.2d 707, 711 (1997) (citation omitted). This is because recantations are inherently unreliable. *Id.*, 208 Wis. 2d at 476, 561 N.W.2d at 712. Where there is no independent corroborating evidence, “the corroboration requirement in a recantation case is met if: (1) there is a feasible motive for the initial false statement; and, (2) there are circumstantial guarantees of the trustworthiness of the recantation.” *Id.*, 208 Wis. 2d at 477–478, 561 N.W.2d at 712.

¶6 In a hand-written statement dated January 26, 2011, Delaney stated:

On November 9th 2010 I took the stand on Greenwood and stated that he was involved in this crime. As of today I’m

confessing that I lied and that Greenwood had “no parts” in this crime. On March 15th 2009, the day of my capture, two detectives questioned me about the crime at hand. At first I told them I didn’t know what they were talking about. Then they started showing me pictures of myself, Greenwood, and Brooks (who also got convicted of this crime) also pictures of two females that we used to hang with Amy and Lindsey. They stated that they already knew that Greenwood, myself and Brooks had committed this crime.... When the detectives mentioned that they already knew that all three of us committed the crime because [they had] two sources, I confessed. I didn’t tell them that Greenwood wasn’t involved because I was still mad at him because, months before [an] incident happened in front of my home, where Brooks and Greenwood jumped on a good friend of mine[] and fled. I was mad that I couldn’t find him and pay him back. So when they mentioned his name I figured that was the perfect way to pay him back. Now that I look back and see that they gave him 24 years for a crime he didn’t commit, it just doesn’t sit right with me. I brought someone I was cool with down just because I held a[] grudge against him and couldn’t find a way to pay him back.

¶7 Assuming that the facts alleged by Greenwood in his postconviction motion are true—that is, that Delaney would testify in court consistent with his affidavit—Greenwood has failed to show that Delaney had a feasible motive for initially providing false testimony against Greenwood. Delaney states that he testified falsely against Greenwood at trial “to pay him back” for attacking a good friend of his. Delaney does not explain who the friend was, what injuries his friend sustained, or why Greenwood attacked his friend. Delaney also does not explain when the attack occurred or why he remained angry about the attack for so long. A defendant must allege grounds for his or her postconviction motion with specificity, ideally including information about “who, what, where, when, why, and how.” *State v. Allen*, 2004 WI 106, ¶2, 274 Wis. 2d 568, 573, 682 N.W.2d 433, 436 (citations omitted). Delaney’s allegations are not detailed enough for us to conclude that he had a feasible motive for testifying falsely in the first place. Moreover, Delaney’s purported motive for recanting is illogical in light of the fact

that Delaney also testified against *Brooks* when Brooks was tried. Delaney's assertion that he provided false testimony because he was angry at Greenwood fails to explain why Delaney would also testify falsely against Brooks.

¶8 Greenwood next argues that he received ineffective assistance of trial counsel. To establish a claim of ineffective assistance of counsel, a defendant must show both that his lawyer's performance was deficient and that his lawyer's deficient performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). In deciding whether a lawyer has performed deficiently, we look at "whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688. To determine whether a defendant was prejudiced, we look at whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

¶9 Greenwood first argues that his trial lawyer, Marcella DePeters, should have impeached State witness Jose Reyes. Reyes testified that Greenwood confessed to his role in Dean's robbery and murder when they were prison cellmates in 2007. Greenwood contends that Reyes had a potential alternative source for the information about Dean's murder, the criminal complaint charging Brooks with first-degree intentional homicide. Greenwood contends DePeters should have introduced the criminal complaint from the case against Brooks into evidence to support the argument that he did not confess to Reyes; instead, Reyes learned the details about the murder from the complaint.

¶10 DePeters did not perform deficiently with regard to impeaching Reyes. She attempted to impeach Reyes when she cross-examined him by asking whether he had seen Brooks's complaint. Reyes testified that he did not see it

until *after* he told his lawyer about his conversation with Greenwood, undermining the argument that Reyes got the information from the complaint. Moreover, Reyes testified about details of the crime that were not in the complaint, and his testimony was not consistent in all respects with the information in the complaint. DePeters might have harmed Greenwood's argument that the complaint was an alternative source of Reyes's information, rather than bolstering that argument, by attempting to introduce the complaint into evidence because this may have served to highlight the differences between the complaint and Reyes's testimony. DePeters did not performed deficiently.

¶11 Greenwood's second argument is that DePeters should have impeached Reyes with evidence that he lied on the stand when he testified that he did not file a motion for sentence modification in early 2007. After Reyes's testimony in this regard, DePeters argued to the circuit court that Reyes's docket sheet showed that Reyes's lawyer had filed a motion for sentence modification on his behalf in June 2007. We agree with the State's analysis:

[T]he circuit court carefully examined the docket sheet and concluded that it did not support DePeters' argument. The court found that there was no suggestion in the proffered document that attorney Hess represented Reyes in 2007 as DePeters contended. Reconsidering the document, DePeters conceded this point. The court also found the docket sheet confusing and ambiguous as to whether Reyes filed a sentence modification motion at all in 2007 (as opposed to some earlier time). Accordingly, the document itself, without additional extrinsic evidence, simply could not prove what DePeters wanted it to prove. For this reason, DePeters could not use this document to show that Reyes testified falsely. [Record citations omitted.]

We therefore reject Greenwood's argument that DePeters performed deficiently by failing to impeach Reyes with information that he lied when testifying.

¶12 Greenwood’s third argument is that DePeters was constitutionally ineffective because she did not call Christopher Gilmore as a defense witness. He argues that Gilmore would have testified that Delaney told him that he committed this crime with two other individuals, not Brooks and Greenwood. Although DePeters told the circuit court at the beginning of the trial that she intended to call Gilmore, when the time came for the defense to present its case, she decided not to call him, even though Greenwood disagreed. She explained to the circuit court that she was concerned that calling Gilmore would open the door to introduction of evidence about Greenwood’s criminal associations with Brooks and Delaney, including another robbery dismissed by the State and a criminal incident at the Mayfair Mall involving a gun. DePeters further explained that she was concerned that if Gilmore testified that Delaney told him he made up the story about the involvement of Greenwood and Brooks, then the State would probably respond by introducing evidence showing that a jury had already convicted Brooks of homicide for Dean’s murder, which would ultimately be more detrimental to Greenwood than any benefit from Gilmore’s testimony.

¶13 DePeters’s decision not to call Gilmore was the product of a carefully considered trial strategy. The decision whether to call Gilmore was committed to DePeters’s judgment, based on her professional experience, even if her client disagreed with her. “We will not second-guess a trial attorney’s considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.” *State v. DeLain*, 2004 WI App 79, ¶20, 272 Wis. 2d 356, 369, 679 N.W.2d 562, 568 (internal quotation marks omitted). We reject the argument that DePeters performed deficiently by refusing to call Gilmore as a witness.

¶14 Greenwood's last ineffectiveness claim is that DePeters should have called Kevin Burks to testify at trial on his behalf. Detective Scott Gastrow testified that he interviewed Burks in connection with the investigation of Dean's murder on April 25 and May 11, 2007. Greenwood contends that DePeters should have called Burks to show that Reyes could have received information from Burks about Dean's murder, rather than from him, because Reyes and Burks were both inmates at Dodge Correctional Institution during the summer of 2007. Greenwood contends this could have been important to his trial because a key defense strategy was to discredit Reyes's claim that Greenwood confessed to him that he participated in Dean's robbery and murder.

¶15 "When a defendant claims that trial counsel was deficient for failing to present testimony, the defendant must allege with specificity what the particular witness would have said if called to testify." *State v. Arredondo*, 2004 WI App 7, ¶40, 269 Wis. 2d 369, 397, 674 N.W.2d 647, 660. Greenwood has not stated with specificity what Burks would have said had he testified. Moreover, when DePeters called Reyes on rebuttal to question him about Burks, Reyes testified that he did not know who Burks was. In order to argue that Reyes could have received information about Dean's murder from Burks, Greenwood would have had to show some connection between Reyes and Burks beyond the fact that they both were in the same prison at some point in the summer of 2007. Therefore, we reject Greenwood's argument that his trial lawyer provided him with constitutionally ineffective assistance by not calling Burks to testify.

¶16 Greenwood's final argument is that he is entitled to a new trial in the interest of justice. We may grant a new trial in the interest of justice where "the real controversy has not been fully tried, or [where] it is probable that justice has for any reason miscarried." WIS. STAT. § 752.35. To establish that the real



controversy was not fully tried, Greenwood must show “that the jury was precluded from considering important testimony that bore on an important issue or that certain evidence which was improperly received clouded a crucial issue in the case.” *See State v. Cleveland*, 2000 WI App 142, ¶21, 237 Wis. 2d 558, 572, 614 N.W.2d 543, 550 (quotation marks and citations omitted). To show that justice has miscarried, Greenwood must show “a substantial degree of probability that a new trial would produce a different result.” *Ibid.* (quotation marks and citations omitted). We conclude that none of these circumstances apply in this appeal. Therefore, we reject Greenwood’s argument that he is entitled to a new trial in the interest of justice.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

